

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JIMMY L. NEWMAN, III,

Petitioner,

v.

CDCR,

Respondent.

Case No. 1:20-cv-01118-JDP

FINDINGS AND RECOMMENDATIONS TO  
DISMISS PETITION FOR FAILURE TO  
EXHAUST CLAIM

OBJECTIONS DUE IN THIRTY DAYS

ECF No. 1

ORDER DIRECTING CLERK OF COURT TO  
ASSIGN CASE TO DISTRICT JUDGE

Petitioner Jimmy L. Newman, III, a state prisoner without counsel, seeks a writ of habeas corpus under 28 U.S.C. § 2254. ECF No. 1. This matter is before us for preliminary review under Rule 4 of the Rules Governing Section 2254 Cases. Under Rule 4, a district court must dismiss a habeas petition if it “plainly appears” that the petitioner is not entitled to relief. *See Valdez v. Montgomery*, 918 F.3d 687, 693 (9th Cir. 2019); *Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998). Courts have “an active role in summarily disposing of facially defective habeas petitions” under Rule 4. *Ross v. Williams*, 896 F.3d 958, 968 (9th Cir. 2018) (citation omitted).

1 **Discussion**

2 A petitioner in state custody proceeding with a petition for a writ of habeas corpus must  
3 exhaust state judicial remedies. *See* 28 U.S.C. § 2254(b)(1). The exhaustion doctrine is based on  
4 comity and gives the state court the initial opportunity to correct its alleged constitutional  
5 deprivations. *See Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Rose v. Lundy*, 455 U.S. 509,  
6 518 (1982). A petitioner can satisfy the exhaustion requirement by providing the highest state  
7 court with a full and fair opportunity to consider each claim before presenting it to the federal  
8 court. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); *Duncan v. Henry*, 513 U.S. 364,  
9 365 (1995).

10 Here, petitioner presents one claim for relief: that his prison is wrongfully withholding his  
11 earned custody credits, causing a delay in his release. ECF No. 1 at 3. Petitioner states that he  
12 has not sought any state-level review of his claim. *Id.* at 5-6. Accordingly, it appears that  
13 petitioner has failed to exhaust his claim, and we recommend that his petition be summarily  
14 dismissed. If petitioner has presented his claim to the appropriate state courts, he should provide  
15 proof of these filings to the court in his objections to these findings and recommendations.

16 **Certificate of Appealability**

17 A petitioner seeking a writ of habeas corpus has no absolute right to appeal a district  
18 court's denial of a petition; he may appeal only in limited circumstances. *See* 28 U.S.C. § 2253;  
19 *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). Rule 11 Governing Section 2254 Cases  
20 requires a District Court to issue or deny a certificate of appealability when entering a final order  
21 adverse to a petitioner. *See also* Ninth Circuit Rule 22-1(a); *United States v. Asrar*, 116 F.3d  
22 1268, 1270 (9th Cir. 1997). Where, as here, the court denies habeas relief on procedural grounds  
23 without reaching the underlying constitutional claims, the court should issue a certificate of  
24 appealability "if jurists of reason would find it debatable whether the petition states a valid claim  
25 of the denial of a constitutional right and that jurists of reason would find it debatable whether the  
26 district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).  
27 "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of  
28 the case, a reasonable jurist could not conclude either that the district court erred in dismissing the

1 petition or that the petitioner should be allowed to proceed further.” *Id.* Here, reasonable jurists  
2 would not find our conclusion debatable or conclude that petitioner should proceed further. Thus,  
3 the court should decline to issue a certificate of appealability.

4 **Findings and Recommendations**

5 We recommend that the petition be dismissed, ECF No. 1, and that the court decline to  
6 issue a certificate of appealability. We submit the findings and recommendations to the U.S.  
7 District Court judge who will be assigned to the case under 28 U.S.C. § 636(b)(1)(B) and Rule  
8 304 of the Local Rules of Practice for the United States District Court, Eastern District of  
9 California. Within thirty days of the service of the findings and recommendations, petitioner may  
10 file written objections to the findings and recommendations with the court and serve a copy on all  
11 parties. That document must be captioned “Objections to Magistrate Judge’s Findings and  
12 Recommendations.” The assigned district judge will then review the findings and  
13 recommendations under 28 U.S.C. § 636(b)(1)(C).

14 **Order**

15 The clerk of court is directed to assign this case to a district judge for the purposes of  
16 reviewing these findings and recommendations.

17 IT IS SO ORDERED.  
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19 Dated: August 21, 2020

  
20 UNITED STATES MAGISTRATE JUDGE

21  
22 No. 206.  
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